

EXHIBIT 4

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This opinion is uncorrected and subject to revision before
publication in the New York Reports.

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State of New York et al.,
 Appellants,
 v.
Philip Morris Incorporated,
et al.,
 Defendants.

Commonwealth Brands, Inc.,
et al.,
 Nonparty-Respondents.

Richard Dearing, for appellants.
Robert J. Brookhiser, for nonparty-respondents.
Stephen R. Patton, for Original Participating
Manufacturers.

PIGOTT, J.:

In 1998, the Attorneys General of 46 states (including New York) and five island territories and the Corporation Counsel of the District of Columbia signed a Master Settlement Agreement (MSA) with counsel for the largest tobacco manufacturers in the United States. The MSA was approved, as to New York State, by

Supreme Court. The claims brought against the tobacco manufacturers included wrongful marketing and advertising of cigarettes and other tobacco products. Various states sought damages based on the costs of treating smoking-related illnesses. In exchange for a release of liability, the tobacco manufacturers agreed to make annual payments, to be allocated among the Settling States. They also agreed to extensive marketing and advertising restrictions. The Original Participating Manufacturers, as they are known, were later joined by more than 40 smaller tobacco companies, referred to as the Subsequent Participating Manufacturers (SPMs), including movants Commonwealth Brands, Inc. (Commonwealth), King Maker Marketing, Inc. (King Maker), and Sherman 1400 Broadway N.Y.C., Inc. (Sherman). Lengthy and careful negotiations preceded execution of the MSA.

Not all US tobacco manufacturers have joined the MSA. In order to neutralize cost disadvantages suffered by the Participating Manufacturers (PMs) relative to Non-Participating Manufacturers (NPMs), the MSA provides the Settling States with a strong incentive to enact statutes requiring NPMs to make annual payments toward the costs of treating smoking-related illnesses equivalent to those made by the PMs. The MSA sets out a Model Statute, which, if appropriately enacted, "shall constitute a Qualifying Statute."¹ If a Settling State fails to enact, or

¹ New York enacted Public Health Law article 13-G.

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does not diligently enforce, a Qualifying Statute, PM payments to that state may be subject to the Non-Participating Manufacturer adjustment (NPM adjustment).

In brief, NPM adjustment can be applied to reduce PM payments to a Settling State if (1) PMs collectively lost market share to NPMs in the preceding year² and (2) disadvantages resulting from the MSA were a "significant factor" contributing to that loss. But payment to a Settling State is not subject to the NPM adjustment

"if such Settling State continuously had a Qualifying Statute . . . in full force and effect during the entire calendar year immediately preceding the year in which the payment in question is due, and diligently enforced the provisions of such statute during such entire calendar year."

Settling States that have diligently enforced their respective Qualifying Statutes are not subject to the NPM adjustment; instead, the adjustment is to be reallocated pro rata among Settling States that are subject to the NPM adjustment, reducing the payments they receive. A decision regarding one Settling State's enforcement of its Qualifying Statute could therefore potentially affect the calculation of amounts due to all other Settling States.

The MSA provides that "an Independent Auditor shall

² The aggregate market share of the PMs is compared with their aggregate market share for the base year 1997. If the aggregate market share has decreased by more than 2%, there is a "Market Share Loss."

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calculate and determine the amount of all payments owed pursuant to [the MSA], the adjustments, reductions and offsets thereto (and all resulting carry-forwards, if any), the allocation of such payments, adjustments, reductions, offsets and carry-forwards among the Participating Manufacturers and among the Settling States, and shall perform all other calculations in connection with the foregoing." The Independent Auditor "shall be a major, nationally recognized, certified public accounting firm." PricewaterhouseCoopers LLP is currently the Independent Auditor.

The Independent Auditor is responsible for determining whether or not PMS collectively lost market share to NPMs. If there is such a loss, "a nationally recognized firm of economic consultants (the 'Firm')" will determine whether disadvantages resulting from the MSA were a significant factor contributing to the loss; its determination is "final and non-appealable." To allow the Independent Auditor to reach a determination about the NPM adjustment before the Firm makes its decision regarding the significant factor condition, the MSA authorizes the Independent Auditor, when information necessary for a determination is missing and not readily available to a party, to "employ an assumption as to the missing information producing the minimum amount that is likely to be due with respect to the payment in question."

The courts that approved the MSA retain jurisdiction to

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decide disputes about it, as to their respective Settling States, except as otherwise provided. At issue in this case is one of the exceptions, an arbitration provision governing the resolution of disputes about the Independent Auditor's calculations and determinations:

"Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determination made by, the Independent Auditor (including, without any limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX (j) or subsection XI (i)) shall be submitted to binding arbitration before a panel of three neutral arbitrators, each of whom shall be a former Article III federal judge. Each of the two sides to the dispute shall select one arbitrator. The two arbitrators so selected shall select the third arbitrator. The arbitration shall be governed by the United States Federal Arbitration Act."

In March 2004, the Independent Auditor issued preliminary and final notices of calculation for payments due from the PMs for 2003. It determined that the PMs had suffered a market share loss and, employing the "missing information" provision, assumed that disadvantages brought on by the MSA were a significant factor contributing to this loss.³ But the Independent Auditor declined to apply the NPM adjustment, rejecting a request from the movants to do so. Citing information provided by the National Association of Attorneys

³ In March 2006, the Firm determined that disadvantages resulting from the MSA were a significant contributory factor.

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General that all Settling States had enacted Model Statutes represented to be "in full force and effect," the Independent Auditor concluded that "no possible NPM adjustment is allocated to PMs."

Three SPMs -- Commonwealth, King Maker and Sherman -- moved in Supreme Court to compel arbitration. Movants disputed the Independent Auditor's refusal to apply the NPM adjustment, asserting that it had no right to presume diligent enforcement of Qualifying Statutes. Supreme Court denied the motion. The movants appealed. The Appellate Division reversed and ordered the motion to be granted (30 AD3d 26 [2006]). We granted the State leave to appeal, and now affirm.

The plain language of the MSA compels arbitration. The parties to the MSA agreed that "[a]ny dispute, controversy or claim arising out of or relating to calculations performed by, or any determination made by, the Independent Auditor" (emphasis added) will be subject to arbitration. By using the expansive words "any" and "relating to," the MSA makes explicit that all claims that have a connection with the Independent Auditor's calculations and determinations are arbitrable.

We discern no intent to limit arbitration to review of calculations performed or decisions reached by the Independent Auditor. Therefore, the State's contention that the Independent Auditor did not reach a "determination" about diligent enforcement of Qualifying Statutes when it concluded that no NPM

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adjustment was possible is not pertinent. The movants' assertions -- that the Independent Auditor should not have presumed that New York diligently enforced its Qualifying Statute and therefore wrongly declined to allocate the NPM adjustment -- constitute claims "relating to" the Independent Auditor's calculations and determinations. The arbitration provision therefore "expressly and unequivocally encompasses the subject matter of the particular dispute" (Bowmer v Bowmer, 50 NY2d 288, 293-294 [1980]).

We find especially compelling the parenthetical clause in the arbitration provision giving examples of arbitrable disputes: "including, without any limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX (j) or subsection XI (i)" (emphasis added). The language is expansive and the examples are telling. MSA subsection IX (j) gives the "Order of Application of Allocations, Offsets, Reductions and Adjustment" by the Independent Auditor, and among the listed adjustments is the NPM adjustment.

It is true that the signatories did not intend to refer all disputes about the MSA to arbitration. The arbitration clause is limited to disputes connected with the Independent Auditor's calculations and determinations while at the same time it is expansive within that boundary. Such an arbitration clause

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is misleadingly called broad. Nevertheless, the movants' claims fall within its purview.

Our plain language interpretation of the arbitration provision is consistent with the use of arbitration "as a means of conserving the time and resources of the courts and the contracting parties" (Matter of Smith Barney Shearson v Sacharow, 91 NY2d 39, 49 [1997], quoting Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am., 37 NY2d 91, 95 [1975])). We note that the arbitration provision occurs in a settlement agreement, and that it is the nature of a settlement to eliminate unpredictable litigation. In this regard, we agree with the Appellate Division that there is fairness to all parties in a "mechanism of submitting disputes involving the decisions of the Independent Auditor to a neutral panel of competent arbitrators, who are guided by one clearly articulated set of rules that apply universally in a process where all parties can fully and effectively participate" (30 AD3d at 32-33).

We therefore conclude that the questions whether New York enacted and diligently enforced a Qualifying Statute and whether it was correctly spared the NPM adjustment are arbitrable.⁴

⁴ All but one of the MSA and appellate courts deciding this issue agree that the MSA compels arbitration. The sole exception is State of North Dakota v Philip Morris, Incorporated [et al.] (District Court, County of Cass, State of North Dakota, July 18, 2006, File No. 09-98-C-03778). The highest courts of Connecticut and Massachusetts have expressly endorsed the Appellate

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Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * * * *

Order affirmed, with costs. Opinion by Judge Pigott. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Decided June 7, 2007

Division's reasoning (see State of Connecticut v Philip Morris, Inc., et al., 279 Conn 785 [2006]); Commonwealth of Massachusetts v Philip Morris Incorporated & others, 448 Mass 836 [2007]).

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